00-1754, 00-1772

Supreme Court, U.S.
FILED
JUN 22 2001
CLERK

In The

# Supreme Court of the United States

I-125 PROPONENTS' COMMITTEE,

*Petitioner,*

v.

MONTANA CHAMBER OF COMMERCE, et al.,

*Respondents.*

LINDA L. VAUGHEY,
Commissioner of Political Practices,

*Petitioner,*

v.

MONTANA CHAMBER OF COMMERCE, et al.,

*Respondents.*

**On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Of Counsel:
STEPHEN A. BOKAT
National Chamber
Litigation Center
1615 H St., N.W.
Washington, DC 20062
(202) 463-5337

STANLEY T. KALECZYC
*Counsel of Record*
KIMBERLY A. BEATTY
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
139 N. Last Chance Gulch
P.O. Box 1697
Helena, MT 59624
(406) 443-6820

*Counsel for Respondents Montana Chamber of Commerce, Sletten Construction Company, Lehrkind's, Inc., Kalispell Area Chamber of Commerce, Montana Hospital Association, and the Montana Farm Bureau Federation*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

## QUESTION PRESENTED

1. Whether this Court should review the Ninth Circuit's opinion which is consistent with more than twenty years of precedent from this Court and with the interpretations of that precedent by other Circuits which hold that a ban on corporate contributions and expenditures made in connection with ballot issue campaigns violates the First Amendment?

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondents Montana Chamber of Commerce, Sletten Construction Company, Lehrkind's, Inc., Kalispell Area Chamber of Commerce, Montana Hospital Association, and the Montana Farm Bureau Federation, or any affiliates thereof, have not issued shares to the public. The Montana Education Association was dismissed from the case prior to trial below after it disincorporated during the pendency of the lawsuit and, thus, is not a party to this action.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ..... ii

TABLE OF AUTHORITIES ..... v

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE WRITS ..... 1

I. THE NINTH CIRCUIT, CONSISTENT WITH THE HOLDINGS OF THIS COURT, OTHER CIRCUIT COURTS AND ITS OWN PRIOR PRECEDENT, PROPERLY CONCLUDED THAT I-125 UNCONSTITUTIONALLY ABRIDGES POLITICAL SPEECH IN BALLOT ISSUE CAMPAIGNS ..... 2

A. *First National Bank of Boston v. Bellotti* and its Progeny Protect Speech on Ballot Issues ... 2

B. The *Austin* Decision Does Not Apply to Ballot Issues and Does Not Establish a New Standard Applicable to Ballot Issue Cases. 7

1. *Austin* applies only to candidate campaigns ..... 8

2. This Court has recognized a constitutionally significant distinction between ballot issue campaigns and candidate campaigns ..... 10

TABLE OF CONTENTS – Continued

Page

II. THE RECORD ESTABLISHES THAT IT IS IMPERMISSIBLE TO RELY UPON A SEPARATE SEGREGATED FUND AS AN APPROPRIATE ALTERNATIVE METHOD OF SPEECH SINCE SUCH A FUND IS NEITHER THE LEAST RESTRICTIVE MEANS FOR ABRIDGING FIRST AMENDMENT RIGHTS NOR AN ADEQUATE ALTERNATIVE TO UNFETTERED CORE POLITICAL SPEECH ..... 12

III. THE NINTH CIRCUIT PROPERLY REVIEWED THE DETERMINATIONS OF THE DISTRICT COURT *DE NOVO* WHEN IT DETERMINED THAT THE PETITIONERS DID NOT DEMONSTRATE A COMPELLING STATE INTEREST JUSTIFYING AN ABRIDGMENT OF CORE POLITICAL SPEECH IN BALLOT ISSUE CAMPAIGNS ..... 15

CONCLUSION ..... 19

## TABLE OF AUTHORITIES

Page

CASES

*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) ..... 5, 7, 9, 10

*Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ..... 5

*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... 18

*C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd*, 583 F.2d 421 (9th Cir. 1978) ..... 2, 6, 7

*Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) ..... 2, 4

*Colorado Republican Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604 (1996) ..... 15

*Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980) ..... 3, 4, 11, 13

*Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ..... 9

*Federal Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) ..... 4

*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) ..... *passim*

*Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998) ..... 18

*Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980) ..... 2, 7

*McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995) ..... 5

TABLE OF AUTHORITIES – Continued

Page

*Montana Chamber of Commerce v. Argenbright*, 28 F. Supp. 2d 593 (D. Mont. 1998), *aff'd*, 226 F.3d 1049 (9th Cir. 2000), *reh'g and reh'g en banc denied*, (9th Cir. 2001) ..... 2, 6, 15, 16

*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) .... 18

*Pacific Gas & Electric Co. v. Berkeley*, 60 Cal. App. 3d 123, Cal. Rptr. 350 (1976) ..... 3, 7

*Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) ..... 12, 15

*Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974) ..... 2, 7

*Thomas v. Collins*, 323 U.S. 516 (1945) ..... 6

*Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622 (1994) ..... 10

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) ..... 13

UNITED STATES CONSTITUTION

U.S. Const. amend. I. ..... *passim*

COURT RULES

Supreme Court Rule 14(1)(g) ..... 1

## STATEMENT OF THE CASE

Respondents concur with the recitation of Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved set forth in the Petitions for Writ of Certiorari of Linda L. Vaughey and I-125 Proponents' Committee.[1]

Respondents generally concur with the Statement of the Case presented by Petitioner Vaughey. Respondents, however, take exception to the Statement of the Case presented by the I-125 Proponents' Committee in that it fails to set forth all the facts "material to consideration of the questions presented" as required by Supreme Court Rule 14(1)(g). Additional material facts are set forth in this Opposition and referenced to the Trial Transcript ("RT") and Trial Exhibits.

## REASONS FOR DENYING THE WRITS

The decisions of the Ninth Circuit and the District Court below correctly applied the controlling precedents of this Court in holding that I-125 abridges core political speech in violation of the First Amendment. The decisions below are also consistent with prior decisions of those courts themselves, as well as other Courts of Appeals, and thus there is no split in the Circuits. Petitioners failed to meet their burden of demonstrating a compelling state interest to justify the abridgment of First

[1] The decisions of the courts below are reproduced in the Appendices of the respective Petitions, which Appendices are identical. Appendix references in this Opposition are "App."

Amendment rights or that I-125 is the least restrictive means of effecting any abridgment. The Ninth Circuit and the District Court properly determined that the empirical evidence and expert testimony presented by the Respondents, Plaintiffs below, demonstrated that the political process in Montana related to ballot issues is, in the words of the District Court, "healthy and of sound integrity." 28 F. Supp. 2d 593, 598-599, App. at 46.

## I. THE NINTH CIRCUIT, CONSISTENT WITH THE HOLDINGS OF THIS COURT, OTHER CIRCUIT COURTS AND ITS OWN PRIOR PRECEDENT, PROPERLY CONCLUDED THAT I-125 UNCONSTITUTIONALLY ABRIDGES POLITICAL SPEECH IN BALLOT ISSUE CAMPAIGNS.

### A. *First National Bank of Boston v. Bellotti* and its Progeny Protect Speech on Ballot Issues.

This Court has consistently and unambiguously stricken as violative of the First Amendment any attempts to prohibit or limit contributions or expenditures in connection with discussion of public policy issues, including ballot issues. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Likewise, both the lower federal courts and state courts have respected the importance of robust political speech and debate concerning ballot issues. *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 ( D. Mont. 1976), *aff'd*, 583 F.2d 421 (9th Cir. 1978); *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980); *Schwartz v. Romnes*, 495 F.2d 844 (2d

Cir. 1974); *Pacific Gas & Electric Co. v. Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976).

As this Court held in *Bellotti*, the proper question is not whether corporations have First Amendment rights or whether those rights are similar to the rights of natural persons; rather, the question is whether "[this statute] abridges expression that the First Amendment was meant to protect." *Id.* at 776. Continuing, this Court stated:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

*Id.* at 777 (footnotes omitted).

This Court's decision in *Bellotti* was followed two years later by *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980), in which the Court struck down, again on First Amendment grounds, a decision of the New York State Public Service Commission which prohibited public utilities from including mailing inserts with customer bills which discussed controversial issues of public policy. In so ruling, the Court, expressly relying upon its prior decision in *Bellotti*, concluded:

> The Commission's suppression of bill inserts that discuss controversial issues of public policy

> directly infringes the freedom of speech protected by the First and Fourteenth Amendments. The state action is neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest. Accordingly, the regulation is invalid.

447 U.S. at 544 (citations omitted).

In its next term, this Court again addressed a state effort to limit the ability to speak on public policy issues. In *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), the Court invalidated a law that would have limited contributions to political committees formed to support or oppose ballot issues. The Court recognized that "undue influence" is a potential problem in candidate election cases, but cases upholding limits or restrictions in the candidate arena do not support limitations on ballot issues. "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections [citations omitted] simply is not present in a popular vote on a public issue." 454 U.S. at 298 (citing *Bellotti*, 435 U.S. at 790).

The animating consideration in each of these cases is the concern that First Amendment rights may be limited only where there is a showing of a compelling governmental interest. As this Court noted in *Federal Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480, 495-96 (1985), *Bellotti* stands for the proposition that "a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates."

In its more recent decisions, this Court has reiterated that the *Bellotti* standard is applicable in determining the constitutionality of prohibitions and restrictions upon the exercise of First Amendment rights in ballot issue campaigns. In *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334 (1995), a case decided after *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990),[2] the Court found unconstitutional a prohibition against the distribution of anonymous campaign materials which applied "to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage." 514 U.S. at 351-352 & n.15 (citing *Bellotti*, 435 U.S. at 790, for the proposition that "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue"). In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the Court, citing to the same language in *Bellotti* that it relied upon in *McIntyre*, noted that, "ballot initiatives do not involve the risk of '*quid pro quo*' corruption present when money is paid to, or for, candidates." 525 U.S. at 203 (citations omitted).

In view of this clear line of precedent, it is no wonder the Ninth Circuit properly concluded I-125 is unconstitutional:

> It follows that I-125 unconstitutionally restricts public discussion in the ballot issue (initiative) process. As the Court concluded in *Bellotti* with

---

[2] Petitioners argue *Austin* created a new standard for determining permissible abridgements of First Amendment rights. This is simply not the case.

> respect to the Massachusetts statute, we conclude here that, " '[a] restriction so destructive of the right of public discussion [as I-125], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.' " [*Bellotti*, 435 U.S.] at 792 (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945)).

226 F.3d 1049, 1057-1058, App. 20-21 (citations omitted; footnote omitted).

Over twenty years earlier, both the Montana District Court and the Ninth Circuit reached the same conclusion that efforts by the state of Montana to prohibit corporations from making contributions or expenditures on ballot issues violates the First Amendment. In *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd*, 583 F.2d 421 (9th Cir. 1978), the District Court found that a statute prohibiting such contributions and expenditures by corporations unconstitutionally affected core First Amendment rights, and the government's stated interest in keeping the electoral process free from corporate influence or corruption was deficient and not a valid compelling state interest. "[T]he State of Montana cannot constitutionally legislate a direct prohibition on the exchange of ideas and information, involved in one form of the legislative process, merely because the source of the information is a corporation." *Id.* at 1265. The Ninth Circuit concurred, stating "the portion of [the statute] which forbids payments or contributions by corporations in support of or opposition to ballot issues is an unconstitutional restriction of corporate First Amendment rights." 583 F.2d at 425.

The Ninth Circuit's decision in this case and in *C & C Plywood* comports with decisions from other jurisdictions which have stricken on First Amendment grounds laws similar to I-125. *See, e.g., Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980) (striking down a Florida statute that restricted the amount of contributions to political committees in support of, or in opposition to, ballot issues); *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974) (narrowly construing a New York statute so that corporations could contribute to ballot campaigns); *Pacific Gas & Electric Co. v. Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976) (striking on First Amendment grounds a city ordinance prohibiting an electric utility from disseminating information on a referendum issue involving municipal acquisition of that utility). There simply is no split among the various Circuits.

In this case, the Ninth Circuit recognized that what is at issue is the right of the electorate – who are the decision makers on constitutional and statutory proposals brought before them through the initiative and referendum process – to hear as many points of view and receive as much information as possible to assist them in their decision-making process. The Ninth Circuit properly followed the line of cases beginning with *Bellotti* which protect this vital First Amendment interest and found I-125 to be unconstitutional.

### B. The *Austin* Decision Does Not Apply to Ballot Issues and Does Not Establish a New Standard Applicable to Ballot Issue Cases.

Petitioners argue that *Austin* established a new criterion for determining when First Amendment rights may be curtailed in the context of ballot issue elections, and

that Austin has *sub silentio* overruled *Bellotti*. Nothing can be further from the truth.

### 1. *Austin* applies only to candidate campaigns.

*Austin* itself did not even address ballot issues. Rather, the issue was whether Michigan could constitutionally prohibit independent expenditures made by corporations in support of or opposition to *candidates*. 494 U.S. at 654. Petitioners' argument that *Austin* created a new standard that applies to ballot issue campaigns as well as candidate campaigns is based upon their reading of a self-proclaimed "critical passage" which is taken out of context. Indeed, the context in which the *Austin* Court conducted its analysis was specifically that of independent expenditures in *candidate* campaigns:

> Although this Court has distinguished these [independent] expenditures from direct contributions in the context of federal laws regulating individual donors, it has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence *candidate elections*. Regardless of whether this danger of "financial *quid pro quo*" corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. . . . We therefore hold that the State has

> articulated a sufficiently compelling rationale to support its restriction on independent expenditure by corporations.

*Id.* at 659-660 (emphasis added; citations omitted).

Two of the Justices who concurred in Austin specifically noted the result would have been different had the subject matter of the controversy involved a ballot issue rather than independent expenditures made on behalf of candidates. Justice Brennan, after first noting the Michigan statute at issue is directed at independent expenditures made in support of candidates, 494 U.S. at 669, concluded, "A corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum [citing *Bellotti*]." *Id.* at 676 (Brennan, J. concurring). Likewise, Justice Stevens noted, "[A]s we recognized in *First National Bank of Boston v. Bellotti*, there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other." *Id.* at 678 (Stevens, J. concurring) (citation and footnote omitted).

Petitioners rely upon "observers" who believe *Austin* stands for the proposition that legislatures are free to restrict corporate expenditures in ballot measures as well as in candidate elections. These "observers," like the Petitioners, are simply wrong. *Austin* stands for the narrow proposition that it is constitutionally permissible to prohibit certain corporations from making independent expenditures in support of or opposition to *candidates*. *Austin*, like the earlier decision, *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), a case involving prohibitions on corporate expenditures made

in connection with Federal candidate campaigns (upon which Petitioners also rely), has nothing to do with ballot issues. The only arguably "new" standard set forth by *Austin* applies to candidate elections, and has no application to ballot issues.

**2. This Court has recognized a constitutionally significant distinction between ballot issue campaigns and candidate campaigns.**

The distinction made by Justice Stevens in his concurring opinion in *Austin*, that, "[T]here is a vast difference between lobbying and debating public issues . . . and political campaigns for election to public office," 494 U.S. at 678, is firmly rooted in First Amendment jurisprudence. A ballot campaign involves a battle over ideas, political debate in its purest form.

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.

*Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 641 (1994) (citations omitted). For this reason, this Court has consistently prohibited attempts, like I-125, to limit the discussion of political issues.

The use of the *Austin* standard to legitimize I-125 would prohibit an entire class of speech and suppress discussion of certain topics by certain segments of Montana's population. *Turner Broadcasting*, 512 U.S. at 642-643.

I-125 facially prohibits only certain types of corporate speech. It does not affect commercial speech or public service announcements, unless the topic is also the subject of a ballot issue. Thus, for example, a corporation could produce public service announcements about the value of smoke detectors in the home, but may not support a ballot issue requiring smoke detectors be installed in every home purchased in a community. Likewise, while a corporation could advocate to the Montana Legislature that this same hypothetical smoke detector requirement be enacted, it could not under I-125 support that same statutory change if it appeared as an initiative or referendum on the ballot. This constitutes an impermissible, content-based regulation which extends "not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison*, 477 U.S. at 537.

Petitioners' unspoken justification for applying the *Austin* standard is that the views of the corporate speaker are to be silenced because corporate opposition to certain ballot initiatives has at times been effective in persuading the electorate to vote against those initiatives. As the Court noted in *Bellotti*, however, the point of such corporate contributions or expenditures in connection with ballot campaigns is to provide information and change minds:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But *the fact that advocacy may persuade the electorate is hardly a reason to suppress it*: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

*Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. at 689.

435 U.S. at 790 (emphasis added). If, during the course of an election cycle, the electorate receives information which results in a change of opinion, and on election day voters cast their votes differently than they would have at the beginning of the campaign, this is evidence of a healthy democracy and an electoral process which retains its integrity. However, if the *Austin* standard is applied to ballot issue campaigns, it would effectively cut off speech and dissemination of information on issues by one side of the debate, thereby denying corporations and certain individuals the right to speak and also denying the entire electorate the right to hear and thus to be informed about diverse viewpoints on public policy issues. The Ninth Circuit applied the correct standard and certiorari is unwarranted.

## II. THE RECORD ESTABLISHES THAT IT IS IMPERMISSIBLE TO RELY UPON A SEPARATE SEGREGATED FUND AS AN APPROPRIATE ALTERNATIVE METHOD OF SPEECH SINCE SUCH A FUND IS NEITHER THE LEAST RESTRICTIVE MEANS FOR ABRIDGING FIRST AMENDMENT RIGHTS NOR AN ADEQUATE ALTERNATIVE TO UNFETTERED CORE POLITICAL SPEECH.

Once it is established that First Amendment rights have been infringed, the infringement may be upheld only if the state's actions are both necessary and narrowly tailored to serve a compelling state interest. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45

(1983). "Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison*, 447 U.S. at 540. In the instant case, after six days of trial testimony and evidence, the District Court determined Petitioners not only failed to demonstrate a compelling state interest, but they failed to demonstrate I-125 affords the least restrictive means for abridging First Amendment rights. After review of the record, the Ninth Circuit agreed.

Petitioners argue the corporate voice is not silenced because I-125 permits an alternative form of expression: A corporation may establish a separate fund through which it may make contributions or expenditures in connection with ballot campaigns. This rationale for justifying abridgment of First Amendment rights has been soundly rejected by this Court. *Consolidated Edison*, 447 U.S. at 541, n.10 ("[W]e have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757, n.15 (1976) (invalidating a prohibition on advertising of prescription drug prices justified in part on the theory that consumers could obtain the information in some other way).

Moreover, the evidence presented at trial clearly demonstrated that a separate fund is not an adequate or meaningful alternative to the silencing of corporate voices. One witness, the Chief Executive of a publicly traded corporation, testified that although a corporation

could assist its employees in establishing and administering a political committee, neither his corporation nor its officers or directors had any ability to direct the use or expenditure of those funds. RT 64-66. He also testified that approximately one-half of the shareholders are themselves corporations, RT 45-46, which would be precluded by I-125 from contributing to any such fund.

The President of an incorporated labor organization testified that although his union had established a separate fund as permitted by I-125, that fund was unable to attract sufficient financial support, primarily because its members believed the dues they already paid were to be used to support political advocacy on their behalf, including advocacy on various ballot issues. RT 185-186.[3]

This testimony clearly established that a corporation and a corporate-sponsored political committee are not the same, nor can a corporation adequately express its views on ballot issues through the use of a separate fund as contemplated by I-125. Thus, because the separate fund provision is not an avenue for corporate expression, the corporate voice is, indeed, silenced and Petitioners failed to prove the separate fund provisions meet the least restrictive means standard.

---

[3] At the time I-125 was enacted, the Montana Education Association (MEA), an incorporated labor organization, was a plaintiff in this suit. By the time of trial below, it had disincorporated, and was thus no longer subject to the prohibitions contained in I-125. Accordingly, the MEA was dismissed.

## III. THE NINTH CIRCUIT PROPERLY REVIEWED THE DETERMINATIONS OF THE DISTRICT COURT *DE NOVO* WHEN IT DETERMINED THAT THE PETITIONERS DID NOT DEMONSTRATE A COMPELLING STATE INTEREST JUSTIFYING AN ABRIDGMENT OF CORE POLITICAL SPEECH IN BALLOT ISSUE CAMPAIGNS.

At trial, the Respondents, Plaintiffs below, had the initial burden of making a prima facie showing that I-125 abridged Plaintiffs' First Amendment rights. The burden then shifted to the State of Montana and Intervenors, Petitioners here, to demonstrate a compelling interest to justify such an infringement. *Colorado Republican Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In characterizing the testimony presented by the Petitioners at trial as "meager anecdotal evidence," 28 F. Supp. 2d at 600, App. at 49, the District Court below properly concluded that the State and the Intervenor failed to meet their burden to "show a compelling state interest to justify a significant infringement of core First Amendment rights." *Ibid.* In affirming the District Court, the Ninth Circuit observed that it could not say that Judge Lovell's findings were "clearly erroneous." The Ninth Circuit reviewed the record before it and the constitutionality of I-125 *de novo*. 226 F.3d at 1054, App. 13. ("We determine the constitutionality of I-125 de novo.") Indeed, not only were Judge Lovell's findings not "clearly erroneous" but, as the Ninth Circuit concluded, were wholly supported by the record.

The Petitioners failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the initiative and referendum process in Montana. Rather, as Respondents' expert, Professor James Lopach, former Chair of the Political Science Department at the University of Montana and an acknowledged expert in the field of Montana's electoral politics, including ballot initiatives, explained during cross-examination, as he conducted his research on the impact of corporate contributions and expenditures in connection with ballot issues, he was "looking for a breach of trust, or . . . a decay that results in cynicism and detachment of the Montana electorate with respect to direct democracy. And I don't see that." RT 364. Professor Lopach reached two conclusions: First, there is no corruption or appearance of corruption in Montana's ballot initiative process. RT 317-318. Second, I-125 will have a negative effect upon the health of the electoral process since it will cut off meaningful speech in politics. RT 345. Judge Lovell accepted the expert testimony of Dr. Lopach that, "[T]his Montana political process is healthy and of sound integrity." 28 F. Supp. 2d at 598-99, App. at 46. Reviewing this record, the Ninth Circuit saw no reason to disturb the findings of the District Court. 226 F.3d at 1057, App. at 20.

The record below demonstrates there was no imminent threat to the democratic process and the Montana electoral process is healthy: There is no evidence of corruption in the form of buying and selling votes or in tampering with election results. RT 874-875. Voter turnout in Montana remains high, Exhibit 32, RT 322, and, in fact, is approximately 15 percentage points higher than the

national average. Exhibit 32, RT 324. Voter fall-off, the failure of voters to vote for all measures on a ballot including those at the bottom of the ballot, is low. Exhibit 32, RT 325-326. In many instances the percentage of voters voting on ballot measures, which are placed on the bottom of the ballot, is higher than the percentage of voters voting on statewide candidate elections, which are placed at the top of the ballot. Exhibits 33-43, RT 326-332.

There is no one factor that influences an election and dictates an outcome. RT 335-337. There is no empirical evidence that the expenditure of money is the principal determinant of the outcome of a ballot issue campaign. In 24 ballot issues where both sides spent money, the side spending the most won only 50 percent of the time. Exhibit 95, RT 341. And, in the 19 ballot elections where two-thirds of the money was spent by one side, the side spending the most won 10 times and lost 9 times. Exhibit 111, RT 1061-1062. In many, but not all, ballot elections where large amounts of money were spent, there was higher voter participation than in ballot elections where little money was spent. Exhibit 106.

The evidence demonstrated that the most important factor which influences outcome is the development of a credible, concise and understandable campaign message. RT 220. The various techniques used to communicate that message do not all involve money and in many instances the difference in funding of opposing sides may itself become a campaign issue. RT 227. Even the Petitioners' witnesses who testified anecdotally about their specific ballot issue experiences agreed that the funding of their opponents' campaigns was, itself, an election issue. RT

559-560; 655-662; 696-698; 1033-1034. The evidence demonstrated that in those campaigns the electorate was fully informed about the issues and voted based upon the competing messages.

The record below demonstrated that the ballot issue process in Montana prior to the enactment of I-125 operated in harmony with "a major purpose of [the First] Amendment . . . to protect the free discussion of governmental affairs." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). After its enactment, I-125 operated to serve a constitutionally impermissible purpose of attempting to equalize the ability of groups or individuals to participate in the electoral process by prohibiting contributions or expenditures by one group made in connection with ballot issue campaigns. As this Court has held:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to "secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure an unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "

*Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (citations omitted)). *See also, Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

## CONCLUSION

The Ninth Circuit properly concluded I-125 is an unjustified and unconstitutional restriction of First Amendment freedoms, and thus properly upheld the District Court's decision. In so concluding, the Ninth Circuit correctly applied the standards set forth in *Bellotti* and other controlling precedents of this Court and determined *Austin* is inapplicable to this case. Every Court of Appeals which has addressed this issue is in agreement that *Bellotti* and its progeny are the controlling precedent and there is no split in the Circuits. Petitioners' claims that the Ninth Circuit failed to use the proper standard of review in deciding this case are without merit. Rather, Petitioners failed to demonstrate that there is a compelling state interest to justify this abridgment of core political speech.

For the foregoing reasons, Respondents respectfully request that the Petitions for Writ of Certiorari be denied.

Respectfully submitted,

STANLEY T. KALECZYC
*Counsel of Record*
KIMBERLY A. BEATTY
139 North Last Chance Gulch
P.O. Box 1697
Helena, MT 59624
(406) 443-6820

*Counsel for Respondents Montana Chamber of Commerce, Sletten Construction Company, Lehrkind's, Inc., Kalispell Area Chamber of Commerce, Montana Hospital Association, and the Montana Farm Bureau Federation*

Of Counsel:

STEPHEN A. BOKAT
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337